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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

MOHAMED SALEH, on behalf of himself  
and all others similarly situated,

Plaintiff,

v.

UDEMY, INC.

Defendant.

Civil Action No. 23-cv-2207  
District Judge Julien X. Neals  
Magistrate Judge Jessica S. Allen

**UNITED STATES OF AMERICA'S  
ACKNOWLEDGMENT OF CONSTITUTIONAL CHALLENGE**

On May 24, 2023, Defendant filed a notice of constitutional question concerning the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710, pursuant to Federal Rule

of Civil Procedure 5.1 and Local Civil Rule 24.1. ECF No. 21. That notice states that Defendant’s answer and affirmative defenses, ECF No. 16, “raise the question of whether the VPPA is unconstitutional because it violates the First Amendment of the U.S. Constitution.” ECF No. 21 at 1; *see also* ECF No. 16 at 8.

Although the United States may intervene in any action where the constitutionality of a statute is drawn into question, *see* 28 U.S.C. § 2403, the United States is not aware of any pending motion or other filing in this action that articulates the specific bases underlying Defendant’s constitutional challenge, or which seeks any specific action from the Court on the basis of the constitutional challenge. The United States is also unaware of any certification by the Court of Defendant’s constitutional challenge pursuant to 28 U.S.C. § 2403 and Rule 5.1(b). Moreover, based on a review of the docket in this matter, it appears as though Defendant intends to file a motion to compel arbitration on August 30, 2023. *See* ECF No. 26. If such motion is granted, it may result in the resolution of this matter without requiring the Court to reach the constitutional question. For these reasons, intervention by the United States would be premature at this time. *See Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (“The Court will not ‘anticipate a question of constitutional law in advance of the necessity of deciding it.’” (quoting *Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm’rs*, 113 U.S. 33, 39 (1885))); *Xiong v. Lynch*, 836 F.3d 948, 950 (8th Cir. 2016) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity

of deciding them.” (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988))).

The Solicitor General of the United States must authorize any intervention by the United States, *see* 28 C.F.R. § 0.21, and obtaining authorization may take up to several weeks. Accordingly, should Defendant reassert its challenge to the constitutionality of the VPPA in a dispositive motion or other filing seeking that the Court take some action with respect to the statute, the United States respectfully requests that, pursuant to Rule 5.1 and 28 U.S.C. § 2403, it be given the opportunity to intervene within 60 days of that filing for purposes of defending the VPPA’s constitutionality. Undersigned counsel will monitor the docket in this matter for any such filing.

Dated: July 19, 2023

Respectfully submitted,

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/s/ Leslie Cooper Vigen  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on July 19, 2023, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

/s/ Leslie Cooper Vigen  
United States Department of Justice